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IN THE
Supreme Court of the United States

E.I. DUPONT DE NEMOURS & CO.,
GENERAL ELECTRIC CO., AND
UNC NUCLEAR INDUSTRIES, INC.,

Petitioners,

v.

STEVEN STANTON, GLORIA WISE,
WANDA BUCKNER, SHIRLEY CARLISLE, AND
KATHRYN JANELLE GOLDBLOOM,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents' opposition brief only confirms that the whole point of these lawsuits is to evade the Government's sovereign immunity. Respondents are challenging nuclear emissions planned, authorized, and directed by the U.S. Army as part of the Manhattan Project. The Army authorized these emissions based on its judgment that the Nation's need for plutonium during World War II and the early years of the Cold War outweighed the risk of harm. That is a quintessentially discretionary military judgment entitled to sovereign immunity.

Respondents cannot, and do not, deny that they are challenging discretionary military decisions for which they cannot sue the Government directly. Rather, respondents insist that petitioners have no reason to care about the government-contractor defense in light of the Government's contractual and statutory indemnification obligations. Thus, according to respondents, the decision below lacks "national importance," Opp. 2, 11, precisely because it effectively allows them to evade the Government's sovereign immunity by recovering damages from the public fisc rather than from petitioners.

With all due respect, that approach turns the law upside down, and only highlights the importance of this case. The government-contractor defense exists to protect the Government's sovereign immunity, not to protect government contractors. *See, e.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988). Accordingly, this case is all about the Government's sovereign immunity for its discretionary decisions in the nuclear field. By holding the government-contractor defense categorically inapplicable to any

and all claims under the Price-Anderson Act (PAA), and thereby allowing respondents to challenge the Army's decisions about nuclear emissions at Hanford, the Ninth Circuit effectively abrogated such immunity and opened up a Pandora's Box of liability. To say that the Ninth Circuit's decision raises issues of "national importance" is thus an understatement.

Respondents also miss the mark by downplaying the Ninth Circuit's further ruling that petitioners may be held strictly liable for all nuclear emissions from Hanford, even those emissions within federally authorized limits. In this regard, respondents echo the Ninth Circuit's startling assertion that *only* a federal authorization set forth in a statute or agency regulation or order is entitled to preemptive effect. That assertion is simply not the law: the Army unquestionably had the authority to set the appropriate level of nuclear emissions at Hanford, and state law cannot impose liability for those federally authorized emissions. The Army certainly was not required to publish its nuclear safety standards in the Federal Register to give them preemptive effect, and obviously could not have done so given the secrecy of the entire Manhattan Project.

Finally, respondents try to deny the acknowledged circuit split on the availability of class-action tolling under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), to plaintiffs who file individual claims while class certification is pending. According to respondents, the Sixth Circuit decision on which the Ninth Circuit originally relied (and then, on rehearing, rejected), *Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553 (6th Cir. 2005),

expresses mere "dicta" on this point. But that is incorrect; as respondents themselves recognized below, the Sixth Circuit's ruling on this point is an alternative holding. Indeed, since the petition was filed, the Tenth Circuit has acknowledged and deepened the circuit split on this important and recurring issue of federal law. *See State Farm Mut. Auto. Ins. Co. v. Boellstorff*, 540 F.3d 1223, 1224, 1231-32 (10th Cir. 2008) (noting that "there is substantial ground for differences of opinion" on this issue, and that "the four circuits that have offered opinions on the issue have split evenly").

REASONS FOR GRANTING THE WRIT

I. The Government-Contractor Defense

Respondents' argument on the government-contractor defense boils down to the proposition that "[t]he PAA and the government-contractor defense occupy the same ground and cannot be reconciled." Opp. 13. That proposition, which also animates the decisions below, is both manifestly incorrect and hugely consequential.

Contrary to respondents' assumption, the establishment of a regime to indemnify nuclear contractors or licensees *if* they are held liable in no way suggests an intent to expand the circumstances under which they may be held liable in the first place. The Government simply wanted to assure such licensees and contractors that they would not face ruinous liability in the event of a nuclear incident, not to strip them of any defense to liability. Where the PAA wanted to negate a defense to liability, it did so expressly. *See, e.g.*, 42 U.S.C. § 2210(d)(7) (with respect to underground nuclear detonations, "no immunity or defense founded in the

Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar ... liability"); 42 U.S.C. § 2210(n)(1) (authorizing the Secretary of Energy to obtain a waiver of "any issue or defense as to charitable or governmental immunity" with respect to "any extraordinary nuclear occurrence").

It is simply not true, then, that "[u]nder the PAA, the government is *supposed* to pay" even where a nuclear licensee or contractor has a valid defense to liability. Opp. 14 (emphasis in original). The Government's indemnification obligations under the PAA do not arise until after a licensee or contractor has been held liable. Because the government-contractor defense relieves government contractors of *liability*, not merely "*financial responsibility*," Opp. 13 (emphasis added), for implementing the Government's discretionary decisions, there is no inconsistency whatsoever between that defense and an indemnification regime.

Respondents thus miss the point by insisting that "the court of appeals' holding will not affect the willingness of contractors to work with the United States on nuclear-power projects because the statute indemnifies contractors." Opp. 10. As noted above, the government-contractor defense seeks to protect the Government's sovereign immunity, not government contractors. By agreeing to indemnify nuclear licensees and contractors in the event they are held liable for a nuclear incident, the Government in no way, shape, or form waived its own sovereign immunity. *See, e.g.*, *Lane v. Peña*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be

unequivocally expressed in statutory text, and will not be implied.") (internal citations omitted). And unless and until the Government waives its own sovereign immunity, the government-contractor defense applies with full force.

Nor is there any merit to respondents' argument that the government-contractor defense does not apply to federal statutes at all. *See* Opp. 11-12. That defense, as this Court has recognized, is rooted in federal common law. *See Boyle*, 487 U.S. at 504-12. And, as this Court has further recognized, when Congress enacts federal statutes, it acts against the background of the common law, including federal common law. *See, e.g., United States v. Texas*, 507 U.S. 529, 534 (1993). Respondents thus err by insisting that the key point here is that the PAA "*specifies* no such defense," Opp. 12; rather, the key point here is that the PAA nowhere *precludes* the federal common law government-contractor defense.

Like the Ninth Circuit, respondents are thus reduced to arguing that the government-contractor defense was not well-established at the time of the relevant PAA amendments in 1988, even though this Court's decision in *Boyle* was already on the books. *See* Opp. 19-21; Pet. App. 19-23a. Respondents base that argument on the absence of any mention of *Boyle* or the government-contractor defense in the legislative history of those amendments. But the whole point of the presumption that Congress legislates against the backdrop of the common law is to provide a default rule precisely where a statute does not speak to a particular issue. The fact that the legislative history of the 1988 PAA amendments does not mention *Boyle* thus proves nothing:

Congress does not need to, and cannot realistically be expected to, specify in the legislative history that it has not addressed a particular issue in a statute because it is relying on a background common law rule. Indeed, that approach would effectively render the presumption a dead letter.

But, putting aside the merits, the ultimate point here is that the Ninth Circuit's sweeping holding that the government-contractor defense is categorically unavailable to any and all claims under the PAA (*i.e.*, any and all claims "arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material," 42 U.S.C. § 2014(q)), warrants this Court's review. That decision effectively abrogates the Government's sovereign immunity in a critical area of national life, and thereby not only subjects the public fisc to potentially unlimited liability but also opens up the Government's discretionary decisionmaking (including, as in this case, discretionary *military* decisionmaking) to inappropriate and unwarranted judicial second-guessing. *Cf. Winter v. NRDC, Inc.*, No. 07-1239, 2008 WL 4862464, at *12 (U.S. Nov. 12, 2008) (emphasizing need for judicial deference to discretionary military decisions). This is precisely the kind of issue of national importance on which this Court, not the Ninth Circuit, should set forth the law of the land.

II. Strict Liability

Respondents next argue that it is perfectly appropriate to hold petitioners strictly liable here, even for federally authorized emissions, because "[t]here was an absence of 'federal machinery' that

might have produced federal legal standards having the force of law." Opp. 25. In respondents' view, only a federal statute or an agency regulation or adjudicatory order can establish such "standards." *See id.* at 24. That argument reflects a fundamentally misguided, and radically cramped, view of federal preemption.

Contrary to respondents' suggestion, federal executive action outside the agency context can have preemptive effect. *See, e.g., American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-14 (2003); *cf. Medellín v. Texas*, 128 S. Ct. 1346, 1371-72 (2008). The Constitution specifically vests the President with authority as "Commander in Chief" of the armed forces. U.S. Const. Art. II § 2. Where, as with respect to the Manhattan Project, the President delegates that authority to military officers, those officers speak with the force of law, and thus may preempt inconsistent state law, within the scope of that delegation. Indeed, were the law otherwise, a State could have shut down the Manhattan Project by barring any nuclear-related activity within its borders. Respondents' argument that the nuclear safety standards for the top-secret Manhattan Project would have had preemptive effect if published in the Federal Register, *see* Opp. 25, only underscores the illogic of their position, especially given that (even under the Administrative Procedure Act, enacted in 1946) administrative rulemaking procedures are categorically inapplicable to "a military or foreign affairs function of the United States," 5 U.S.C. § 553(a)(1).

Not surprisingly, thus, respondents ultimately fall back on the argument that *no* federal nuclear

safety standards can preempt state law unless specifically set forth in the PAA. *See* Opp. 22 & n.4. In this regard, respondents insist that four federal courts of appeals that have specifically ruled otherwise (including the Ninth Circuit in the decision below, *see* Pet. App. 27a) are "wrong" on this important and recurring issue. Opp. 22 & n.4. If anything, respondents thereby underscore that this issue too warrants this Court's review.

III. *American Pipe* Tolling

Finally, respondents argue that petitioners are "incorrect" to allege a circuit split on the availability of *American Pipe* tolling to preserve individual claims filed while a class certification motion is pending. Opp. 23. That is so, respondents contend, because the Sixth Circuit's *Wyser-Pratte* decision, with which the Ninth Circuit (and, more recently, the Tenth Circuit) expressly disagreed, *see* Pet. App. 41a; *Boellstorff*, 540 F.3d at 1231, sets forth non-binding "dicta" on this point. Opp. 27. But respondents are themselves incorrect.

According to respondents, the Sixth Circuit's decision on *American Pipe* tolling was "unnecessary to the decision in the case and therefore not precedential because the court had already held ... that the applicable ... statute of limitations had expired before th[e] class action was filed." Opp. 27 (internal quotations omitted). But the Sixth Circuit expressly went on to "find in the alternative" that plaintiffs who file individual claims while class certification is pending cannot invoke *American Pipe* tolling. 413 F.3d at 569.

It is axiomatic that where, as in *Wyser-Pratte*, "a decision rests on two or more grounds, none can be

relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *see also Union Pacific R.R. Co. v. Mason City & Fort Dodge R.R. Co.*, 199 U.S. 160, 166 (1905). Either ground, in and of itself, could support the judgment, so there is no reason to grant one ground precedence over the other. That may explain why the Ninth Circuit, in its original opinion in this case, acknowledged that the Sixth Circuit had "addressed this issue directly" in *Wyser-Pratte*, Pet. App. 39a, and why the Tenth Circuit more recently analyzed and ultimately rejected the Sixth Circuit's holding on the merits in *Boellstorff*, *see* 540 F.3d at 1230-32. And that may explain why respondents themselves acknowledged below that *Wyser-Pratte* sets forth an "alternative holding," not dicta, on this point, Pls.' Pet. for Reh'g 7, *In re Hanford Nuclear Reservation*, 534 F.3d 986 (9th Cir. 2008) (Nos. 05-35648 *et al.*), and thus that "there is a genuine split of authority on this issue," Pls.' Joint Br. 43, *In re Hanford Nuclear Reservation*, 534 F.3d 986 (9th Cir. 2008) (Nos. 05-35648 *et al.*).

Nor is there any merit to respondents' argument that this case presents a "poor vehicle" for this Court to resolve the circuit conflict. Opp. 2, 29-30. That argument is based on the proposition that there is something unique about the PAA that would justify a different rule than would apply under any other statute. But the only support respondents muster for that proposition is the PAA's provision giving "the United States district court in the district where the nuclear incident takes place" original jurisdiction over "any public liability action arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210(n)(2). Nothing about that provision remotely

affects class-action tolling. Even where individual claims are filed in (or removed or transferred to) the same court where a class action is pending, that does not mean those individual claims are anything less than "truly separate," Opp. 30, from the class action. Indeed, in *Wyser-Pratte* itself, the individual claims and the pending class action were in the same court, *see* 413 F.3d at 558-60, as was also true in this case, *see* Pet. App. 38a, as well as in *Boellstorff*, 540 F.3d at 1226-27, and *In re WorldCom Sec. Litig.*, 496 F.3d 245, 247-48 (2d Cir. 2007)). Certainly, respondents cannot argue that this case presents a "poor vehicle" for this Court to resolve a circuit conflict created by cases in precisely the same procedural posture as this one.

Nor can respondents make this argument by reference to the particular case-management procedures adopted by the district court below. *See* Opp. 30. To avoid being swamped by a tsunami of individual claims, that court established a procedure whereby plaintiffs who wished to pursue individual claims would simply add their names to a list of Individual Plaintiffs in the Joint Consolidated Complaint. As the Ninth Circuit recognized, this procedure was tantamount to "fil[ing] an individual suit," Pet. App. 38a, which is why the Ninth Circuit proceeded to decide the case on that factual premise, *see* Pet. App. 42a ("We therefore conclude that members of the plaintiff-class *who have filed individual suits* are entitled to the benefits of *American Pipe* tolling. This includes Bellwether Plaintiff, Wise.") (emphasis added). Respondents

certainly cannot evade review of that legal conclusion by challenging its factual premise.[1]

At the end of the day, respondents offer no reason for this Court to delay review of this important and recurring issue of federal law. Indeed, as the Ninth Circuit noted, "both parties concede that the issue is important," and that "numerous" other cases will be governed by the ruling. Pet. App. 37-38a; *see also* Pls.' Joint Br. 42, *In re Hanford Nuclear Reservation*, 534 F.3d 986 (9th Cir. 2008) (Nos. 05-35648 *et al.*) ("It is, confessedly, an *important* legal question ... that could have wide impact in class litigation of all stripes.") (emphasis in original). Notwithstanding respondents' efforts to deny the circuit split, both the Ninth and Tenth Circuits, as well as numerous district courts, have recognized it. *See* Pet. App. 39a; *Boellstorff*, 540 F.3d at 1224, 1231-32; *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2008 WL

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[1] On a related note, respondents urge this Court to deny review of the *American Pipe* tolling issue because respondent Wise "maintains that her individual [lawsuit] was timely even without tolling." Opp. 30 n.6. Although she is perfectly entitled to "maintain[]" that position, it has no bearing on the *American Pipe* tolling issue presented here. Indeed, in its original decision agreeing with petitioners on this issue, the Ninth Circuit remanded for the district court to assess the timeliness of Wise's individual claims. *See* Pet. App. 41a ("On the record before us, we are unable to determine whether Plaintiff Wise's individual suit was timely absent *American Pipe* tolling, because we do not know the triggering date under Washington law for the statute of limitations in her case. We therefore remand to the district court for further proceedings on this issue consistent with our opinion."). Regardless of the resolution of that issue, thus, the threshold *American Pipe* tolling issue is squarely presented here.

2692674, at *2, 4 (E.D. La. July 2, 2008); *see generally* Pet. 31-32 n.3. At this point, the arguments on all sides of the issue have been thoroughly aired, and further percolation will promote nothing besides further uncertainty and wasteful litigation. Both plaintiffs and defendants, as well as the judicial system more generally, would benefit from knowing one way or the other whether a plaintiff foregoes class-action tolling by filing individual claims while a class-certification motion is pending.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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